163 U S 682

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163-682

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JAMES S. DAVENPORT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 747.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

CONFESSION OF ERROR.

In the Supreme Court of the United States.

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CONFESSION OF ERROR.

The defendant was convicted of manslaughter and was sentenced to be imprisoned for the term of seven years, and to pay a fine of $500, together with all costs. (Rec., p. 8.)

The defendant claimed in his testimony that he acted in self-defense, and that the affray was commenced by the deceased. (Rec., p. 311.)

The eleventh assignment of error is as follows:

> It was error in the court to charge the jury as it did charge upon the subject of self-defense, in the following language:
>
> "Now, it is claimed for the defendant in this case that what he did was that which he had a right to do.

In other words, that his act was justifiable, that he acted in the defensive, and not in the aggressive, and that he had a right to slay William Goforth. If he has that right, of course he must get it under the law, because none of us have any rights outside the law. The right that came to us by the law of God is subordinated to the law of the land, or we could not enjoy it. The right is a natural right. The right to liberty is a natural right. The right to possess that which we earn is a natural right. But these rights are all recognized by the civil law of the country, and protected by that law. It is the only law that we have in our condition that can make them secure, and that law will fail of its purpose unless it is executed. It must be put into active operation. Like the deadly weapon, it is defensive. It has no voice to speak. It has no will power that will prompt it to act until we call it into action. It is simply a rule of action in our hands that we are able to apply properly in every case, and then enforce its provisions for the protection of even the smallest right belonging to the citizen. Now, I say, if this right of self-defense exists in this case for the defendant, he must get it from the law, and we must know whether he has it or not, as we can only know that fact by going to the law. That is the source of it. We must go to the source of this right, and get definition there, and then we take that definition and see whether it fits the case as shown by the evidence. If it does, then it is applicable to the case. If it does not, then there is crime, and it falls under the head of one or the other of the definitions I have given to you, because then you would eliminate from the case the third proposition—that is, the right of self-defense. Now, there are two propositions that make up this law, and but two. There are many subordinate ones

which enter into—there are many things that enter into these propositions stated in their simplest form that are to be noted with care by the jury in order to enable them to say intelligently whether there is a state of case here to which it can be applied. We will see what these propositions are. Now, the law says that if at the time the party was slain there was a certain condition existing, and it was one that could not be avoided except by the party doing what he did do, he had a right to do that which he did do. We are to note what the character of that condition is, under the proposition that I am now about to give to you. The law says that if 'a man who is in the lawful pursuit of his business is attacked by another'—that means that the other is doing some act of violence to him, or about to do some act of violence, of a certain character, as the law tells you, 'under no circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.' You see the duties that rest upon him. All the time that he is seeking to protect this right that belongs to him there never is a moment where this duty leaves him. It clings to him. It is around him all the time—the duty of using less violence than that which produces death; the duty of disabling his adversary, if it be in his power, without killing him, having due regard to his own safety; the duty of getting out of the way of the deadly danger, if he can do that with due regard to his own safety, rather than slay his adversary. Why is that a duty? Why, in the first place, if he can save a life he is called upon to do it.

In the second place, his duty to himself calls upon him to exercise caution and care, because if he recklessly engages in a deadly conflict when he could otherwise protect himself he may be slain; he may be the party who falls the victim. Then the duty to himself, his self-interest, the protection of his own life commands him to avoid a resort to this dernier remedy if he can do it. But more than that must exist, as this law tells you. In the first place, under the proposition of the law, at the time that the defendant slew William Goforth, the deceased, the defendant must have been doing what he had a right to do. He must have been in the lawful pursuit of his business at the time he slew William Goforth, and when he was so situated he was attacked by Goforth in such a way as to denote a purpose by Goforth to take away his life, or to do him some enormous bodily harm. If that was the case—and you are to see that condition by the light of this testimony when it is contemplated by you as reasonable men, as men of sound reason and judgment, and capable of deliberating upon that evidence—I say, if that was the condition, and he could not, by using other means which were in his power have saved his own life, or could not have prevented the deadly harm coming from Goforth, the law says that he would have a right to slay him. But if that was the condition and he could, by using these other means, such as getting out of the way of the danger or by using less violence than that which produced his death, and he does not do so, he cuts himself off from the right of the law of self-defense, he can not avail himself of it, because he is required to perform this obligation that rests upon him."

The foregoing extract from the charge is found in the bill of exceptions (pp. 359–362).

Defendant's counsel took the following exceptions:

21. The law of self-defense and the qualifications and limitations put upon it, and comments upon it. (Rec., p. 390.)

37. If defendant could have averted the danger by any less violence, then the rule of the law as to self-defense does not apply. (Rec., p. 391.)

There are a large number of errors assigned, and some of them raise serious questions.

The record contains 462 pages.

It is believed by the undersigned that, although defendant when he claims to have been attacked was not upon his own premises, nevertheless the charge in respect of self-defense is erroneous under the law laid down by this court in *Babe Beard* v. *United States* (158 U. S., 550); see also *Starr* v. *United States* (153 U. S., 614); and that the exceptions are sufficient within the principle adopted by this court in *Allison* v. *United States*, decided December 16, 1895, and other recent cases.

Believing under these circumstances that to have the record printed and to proceed thereafter with the case in the customary manner would cause useless expense, would unduly occupy the attention of this court, and would unduly delay a new trial, the undersigned respectfully file this confession of error.

HOLMES CONRAD,
Solicitor General.

J. M. DICKINSON,
Assistant Attorney General.

EDWARD B. WHITNEY,
Assistant Attorney General.

~~154 U.S. 71~~

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JAMES S. DAVENPORT, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 747.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JAMES S. DAVENPORT, PLAINTIFF IN ERROR,
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THE UNITED STATES.
} No. 747.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the circuit court of the United States for the western district of Arkansas for having murdered one William Goforth, a white man and not an Indian, on January 15, 1895, at the Cherokee Nation, in the Indian Territory. He was found guilty of manslaughter, and sentenced to imprisonment for seven years and to pay a fine of $500. On June 29, 1895, he was admitted to bail in the sum of $10,000.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

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JAN 6 1896
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

JAMES S. DAVENPORT
vs.
THE UNITED STATES.
No. 747.

Response of Plaintiff in Error to the Motion to Advance.

Plaintiff in error begs leave to submit to the court, there is no sufficient reason given in such motion to advance.

Plaintiff is on bail upon a good and sufficient bond, and his attendance is secured; and there is involved in the case no such special question of general or public interest and importance as to authorize the advancement of the case under the rules of this court.

Therefore he prays such motion be denied.

A. H. GARLAND and
R. C. GARLAND,
For Plaintiff in Error.

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Response of Plaintiff in Error to the Motion to Advance.

Plaintiff in error begs leave to submit to the court, there is no sufficient reason given in such motion to advance.

Plaintiff is on bail upon a good and sufficient bond, and his attendance is secured; and there is involved in the case no such special question of general or public interest and importance as to authorize the advancement of the case under the rules of this court.

Therefore he prays such motion be denied.

A. H. GARLAND and
R. C. GARLAND,
For Plaintiff in Error.

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163 US 683

Supreme Court of the United States.

In the Matter of the Petition of

ERWIN DAVIS

For a Writ of Certiorari, &c., to the

U. S. Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONER.

LOGAN, CLARK & DEMOND,
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New York.

WALTER S. LOGAN,
CHARLES M. DEMOND,
Of Counsel.